In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-362

WINCHESTER TV CABLE CO., INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA IN OPPOSITION

Petitioners are operators of community antenna television ("CATV") systems in Winchester and Front Royal, Virginia. Both systems carry the programming of the Washington, D. C., station WRC-TV, a National Broadcasting Company ("NBC") affilate. In January 1970, the Hagerstown, Maryland,

station WHAG-TV commenced operation, also as an NBC affiliate. Winchester is within the principal community contours of WHAG-TV and Front Royal is within that station's Grade B contours. (Contour designations are based on a station's predicted signal strength.) Neither Winchester nor Front Royal is within the Grade B contours of WRC-TV. As a consequence, in the areas served by petitioners WHAG-TV has a higher priority than WRC-TV for purposes of the Federal Communications Commission's nonduplication rule, 47 C.F.R. 76.91, 76.93 and 76.95, 37 Fed. Reg. 3285-3286 (Pet. App. E, 21a-27a).[1] This rule provides, in effect, that CATV systems may not carry programming of one station which duplicates the simultaneous programming of another station with higher priority. Under this rule, petitioners are prohibited from transmitting the NBC programs of WRC-TV at the same time that those programs are being shown on WHAG-TV.

Petitioners' requests for waiver of the nonduplication rule were summarily denied by the Commission. 29 F.C.C. 2d 432 (Pet. App. B, 11a-13a); 30 F.C.C. 2d 610 (Pet. App. C, 14a-19a). The court of appeals affirmed. 462 F. 2d 115 (Pet. App. A, 1a-10a).

Petitioners' sole contentions here are that the nonduplication rule exceeds the Commission's statutory authority and denies equal protection of the laws to CATV operators and subscribers.

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[1] The substance of the nonduplication rule was contained in 47 C.F.R. 74.1103 at the time the proceeding before the Commission was initiated.

1. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, this Court recognized the Commission's authority to regulate CATV through the issuance of rules "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (*id.* at 178). The nonduplication rule involved here falls well within that authority.[2]

Under Section 303(g) and (h) of the Communications Act, 47 U.S.C. 303(g) and (h), the Commission is required to "encourage the larger and more effective use of radio in the public interest" and is authorized "to establish areas or zones to be served by any station." Section 307(b) of the Act, 47 U.S.C. 307(b), further provides that the Commission "shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service * * *." In carrying out these responsibilities, the Commission has determined that the establishment and maintenance of local television service is a fundamental need of an informed citizenry; that these outlets for community expression are jeopardized by the competitive advantages of CATV systems; and that the nonduplication rule is necessary to the maintenance of the

[2] Petitioners argue primarily that the Commission is not authorized to regulate "reception" and thus has no authority over CATV systems. But this general issue was settled adversely to petitioners in *United States* v. *Southwestern Cable Co.*, *supra*. See, also, *United States* v. *Midwest Video Corp.*, 406 U.S. 649.

economic viability of local broadcasters. See *First Report and Order*, 38 F.C.C. 683; *Second Report and Order*, 2 F.C.C. 2d 725. As the court below correctly concluded in an earlier case, the nonduplication rule represents "a fair adjustment and accommodation of conflicting claims to first place in the public interest" and is a proper exercise of the Commission's authority to regulate CATV. *Wheeling Antenna Co.* v. *United States*, 391 F. 2d 179, 183 (C.A. 4). Moreover, the other courts of appeals which have reviewed the nonduplication rule also have upheld it as within the Commission's authority. *Great Falls Community TV Cable Co.* v. *Federal Communications Commission*, 416 F. 2d 238 (C.A. 9); *Titusville Cable TV, Inc.* v. *United States*, 404 F. 2d 1187 (C.A. 3); *Conley Electronics Corp.* v. *Federal Communications Commission*, 394 F. 2d 620 (C.A. 10).

2. Petitioners' challenge to the constitutionality of the nonduplication rule is based on the fact that the rule applies only to CATV systems, whereas simultaneous duplication of programming by broadcasting stations is not similarly prohibited. To the extent that any such discrimination exists,[*] however, it has a reasonable basis rooted in the basic purposes of the Communications Act.

In *Report and Order of Docket 16041*, 26 F.C.C. 2d 772, the Commission announced a policy of en-

[*] The court below took note of petitioners' constitutional contentions but regarded them as premature in light of the absence of any Commission rule permitting duplicative programming in the areas which petitioners serve.

couraging the establishment of network affiliates in small "market fringe areas" presently served only by distant stations located in central market areas. The creation of such affiliates would in many cases result in some duplication of network programming. Thus in a sense local broadcasters are accorded a privilege which the nonduplication rule denies to CATV systems. However, the ends served by *Docket 16041* and the nonduplication rule are the same: the establishment and maintenance of local television service. See *Television Antenna Cable, Inc.*, 30 F.C.C. 2d 610. In *Docket 16041* the Commission was encouraging the development of additional local broadcasting services; by its nonduplication rule the Commission seeks to prevent any diminution of local broadcasting services which might otherwise be occasioned by CATV activity. Both these policies are grounded in the Commission's reasonable determination that "the larger and more effective use of radio in the public interest" and the "fair, efficient and equitable distribution of radio service" will best be served by the establishment and maintenance of local television service. Since the distinction between broadcasters and CATV systems created by *Docket 16041* and the nonduplication rule therefore has a reasonable basis grounded in the policies of the Act, it does not constitute a denial of due process or of equal protection of the laws.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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